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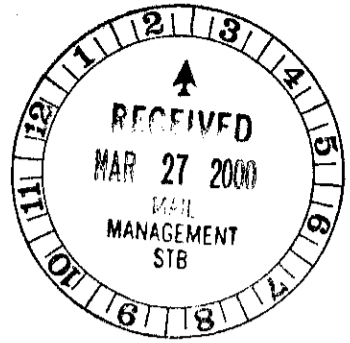
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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS



**REPLY OF NORFOLK SOUTHERN TO BNSF'S
PETITION FOR STAY PENDING JUDICIAL REVIEW**

J. Gary Lane
George A. Aspatore
John V. Edwards
Maquiling B. Parkerson
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2600

G. Paul Moates
Vincent F. Prada
Paul A. Hemmersbaugh
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
(202) 736-8711 (fax)

Counsel for Norfolk Southern Corporation and Norfolk Southern Railway Company

DATED: March 27, 2000

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Pursuant to 49 C.F.R. § 1115.5, Norfolk Southern Corporation and Norfolk Southern Railway Company (jointly, "NS") hereby reply to the petition of Burlington Northern Santa Fe Corporation and The Burlington Northern and Santa Fe Railway Company (jointly, "BNSF") for a stay, pending judicial review, of the Board's March 17th decision ("Decision") to suspend the processing and consideration of major rail consolidation applications for a period of 15 months while the Board develops new standards and procedures for rail combinations.

BNSF's petition elevates private pecuniary gain over the public interest. BNSF's argument boils down to the claim that the Board has an unequivocal, mandatory duty to accept for filing and spend a year or more giving detailed consideration to the merits of BNSF's proposed combination with Canadian National Railway ("CN") *even though* the Board has now determined, based on the substantial evidentiary record developed in this proceeding and its own extensive experience with prior railroad mergers, that it would be contrary to the public interest to process and consider *any* major rail consolidation proposal at this time (and for the next 15 months) given the fragile condition of the rail industry, the likely disruption that another major consolidation proposal would cause, and the need to develop new merger rules better suited to the orderly review of major rail consolidations under these current conditions. A stay would nullify the Board's careful efforts to preserve the status quo, ensure a level playing field in the consideration of the proposed BNSF/CN and other possible responsive transactions and avert a potential industry crisis. But BNSF nonetheless seeks this extraordinary relief merely to prevent a

possible delay of no more than 15 months in the enjoyment of claimed (but unproven) future economic benefits of the proposed (but unapproved) BNSF/CN transaction.

As explained below, these arguments afford no basis for a stay of the Board's Decision. Contrary to BNSF's claims, the Board has ample statutory authority, and overwhelming evidentiary basis, for its decision temporarily to suspend the processing and consideration of major rail consolidations and thereby to preserve the status quo. BNSF and CN would suffer no irreparable injury if they are forced to delay their consolidation plans for up to 15 months (or less if BNSF's judicial review petition is decided favorably sooner). In any event, whatever harm BNSF and CN might suffer is vastly outweighed by the injury to the rail industry, shippers and the public interest that the Board has concluded may result if the BNSF/CN transaction or any other major rail consolidation proposal were to go forward at this time. The balance of equities is, as BNSF claims, unusually clear in this case (Pet. at 10), but that balance weighs decidedly *against* granting a stay.

ARGUMENT

To justify the extraordinary remedy of a stay pending judicial review, BNSF must demonstrate that (1) it is likely to prevail on the merits of its review petition, (2) it will suffer irreparable injury in the absence of a stay, (3) other parties will not be substantially harmed if a stay is granted and (4) a stay would serve the public interest. *See, e.g.,* STB Docket No. AB-55 (Sub-No. 562X), *CSX Transportation, Inc. -- Abandonment Exemption -- in Rocky Mount, Nash County, NC* (served Dec. 30, 1999), at 1. BNSF has not met its heavy burden with respect to any of these required elements.

I. BNSF IS UNLIKELY TO PREVAIL ON THE MERITS.

BNSF's principal challenge to the Decision is that the Board lacks statutory authority to suspend consideration of major rail consolidation proposals under the procedures set forth in 49 U.S.C. §§ 11324-11325 and that, in any event, the Board's suspension order constitutes a *de facto* amendment of the Board's rail consolidation rules without required notice-and-comment

procedures. Pet. at 2-7.¹ BNSF dwells on the statutory remedial provisions cited in the Board's Decision (49 U.S.C. §§ 721(a) and 721(b)(4)), but largely overlooks the fundamental source of the Board's authority to act in this case: the broad "public interest" standard governing review of railroad consolidations (49 U.S.C. § 11324(c)), and the national rail transportation policy that informs it (49 U.S.C. § 10101). See Decision at 2 & n.4, 7, 9, 10. Contrary to BNSF's claims, the Board's public-interest mandate not only permits, but arguably compels, the result the Board has reached, and Sections 721(a) and 721(b)(4) authorize both the *form* of the remedial relief chosen by the Board and the *procedures* the Board followed in granting it.

The statutory touchstone for the Board's suspension order and, indeed, for all of its regulatory actions with respect to railroad consolidations, is consistency with the public interest. 49 U.S.C. § 11324(c). See *Missouri-Kansas-Texas R. Co. v. U.S.*, 632 F.2d 392, 395 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981). This standard constitutes a broad delegation of authority to the Board to exercise its expert judgment and discretion to fashion standards and procedures that implement and further the public interest. See, e.g., *Denver & R.G.W. R. Co. v. U.S.*, 387 U.S. 485, 492-93 (1967); *Penn-Central Merger & N&W Inclusion Cases*, 389 U.S. 486, 498-99 (1968); see also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593-94 (1981); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978).

In carrying out its responsibility to determine the public interest, the Board (like other agencies) also possesses express authority to proceed through rulemaking rather than case-by-case adjudication, and to issue orders necessary to fulfill all of its statutory responsibilities. See

¹ BNSF also argues that the Decision violates First Amendment rights insofar as it directs railroads to suspend activity in furtherance of rail consolidation proposals, including even efforts by BNSF and CN to challenge the Decision or make preparations for a possible invalidation of the Decision. Pet. at 1 n.1. The Board surely did not mean for its Decision to have this effect. NS understands the Decision to go no further than declaring that the Board would suspend its *own* adjudicatory consideration of major rail consolidation proposals and, conceivably, efforts by carriers to invoke the Board's processes and prosecute a major rail consolidation application before the agency. The Board could helpfully eliminate the concerns raised by BNSF by clarifying that its Decision was intended only to suspend the Board's processes. See also NS Reply to CN Stay Pet. at 1-2.

49 U.S.C. § 721(a) (granting Board authority to “prescribe regulations in carrying out this chapter and subtitle IV,” which include provisions governing rail consolidations). Indeed, Section 721(a) confers on the Board broad authority to adopt rules, issue orders and fashion remedies even when not otherwise expressly authorized by statute, provided only that the Board’s chosen remedy furthers a specific statutory mandate of the agency and is “directly and closely tied to that mandate.” *ICC v. American Trucking Ass’ns*, 467 U.S. 354, 367 (1984). *See also Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 655 (1978); *U.S. v. C&O Railway Co.*, 426 U.S. 500, 514 (1976); *American Trucking Ass’ns v. U.S.*, 344 U.S. 298, 309-10 (1953).

Here, the Board’s suspension order was an entirely reasonable exercise of its specific statutory mandate under Section 111324(c) to enforce and implement the public interest with regard to major rail consolidations, and its decision temporarily to suspend consideration of major rail consolidation proposals is unquestionably tied directly and closely to that mandate. Based on abundant support in the evidentiary record, the Board found that *no* major rail consolidation proposal (including the proposed BNSF/CN combination) could be properly considered now, and for a period of 15 months, because of the need to revise and modernize the agency’s rules for consideration of major rail consolidation transactions and to ensure equitable application of those new rules to all major rail consolidation proposals. Decision at 7-9. Moreover, the Board found, again with substantial support in the record, that proceeding now with the consideration of the BNSF/CN proposal while the agency is revisiting its merger rules would be contrary to the public interest given the fragile condition of the rail industry today and the disruptive effect that another major rail consolidation would have on the industry’s ability to correct existing service problems, improve service to shippers and restore investor confidence. *See* Decision at 7-8 (citing “very serious risks” of proceeding with major rail consolidation proceedings now). And the Board reasonably concluded that, because the new rules must be applied equally to all new major rail consolidation proposals (including BNSF/CN), commencing a proceeding to consider a BNSF/CN application before completion of the planned rulemaking would be a useless exercise,

because the BNSF/CN proceeding “quite likely” would “have to start all over again” once the new rules were adopted. *Id.* at 7.

In short, the suspension order clearly constitutes a valid exercise of the Board’s statutory authority to develop reasonable, fair and orderly procedures for consideration of major rail consolidations and to make fully informed, balanced determinations of the public interest. The Board’s action is thus a “legitimate, reasonable and direct[ly] adjunct to the [agency’s] explicit statutory power” to enforce and implement the public-interest mandate of Section 11324(c), and thus is an authorized order under the remedial provisions of Section 721(a). *ICC v. American Trucking Ass’ns*, 467 U.S. at 365 (quoting *Trans Alaska Pipeline Rate Cases*, 436 U.S. at 655).

The Board also possessed statutory authority for the procedures it followed in adopting its suspension order. Section 721(b)(4) authorizes the Board, when necessary to prevent “irreparable harm,” to issue appropriate orders without regard to the procedural requirements of the Administrative Procedures Act (5 U.S.C. §§ 551-559). Here, the Board has made an “irreparable harm” finding under Section 721(b)(4). Decision at 10.² BNSF weakly suggests that consideration and processing of the BNSF/CN application would not threaten irreparable harm (Pet. at 4), but this suggestion is directly contrary to the Board’s findings, which are clearly supported by substantial evidence. Decision at 2, 3-4, 8, 9-10. The Board’s express invocation of Section 721(b)(4) is, thus, a complete rebuttal of BNSF’s claim that the Board violated notice-and-comment procedures. Pet. at 6-7.

BNSF’s other arguments regarding Section 721(b)(4) are equally unavailing. Contrary to BNSF’s claims (Pet. at 3-4), the Board has not invoked this provision merely on the basis of a finding of irreparable harm unrelated to any underlying statutory duty or function, as was the case in the *DeBruce Grain* case cited by BNSF. Insofar as the Board’s suspension order operates as

² The Board’s express findings fully distinguish this case from *Canadian Pacific Railway Co. v. STB*, 197 F.3d 1165, 1168 (D.C. Cir. 1999), where the court declined to sustain a Board order on the basis of Section 721(b)(4) because the agency itself had neither relied on this authority nor made necessary findings.

an injunction as distinct from a declaration of the agency's intent to suspend its own consideration of major rail consolidation applications (which is unlikely) (*see* note 1, *supra*), it directly enforces and effectuates the Board's public-interest mandate under Section 11324(c), and is reasonably related to that administrative function. And, as *DeBruce Grain* itself confirms, Section 721(b)(4) is not confined to injunctive orders relating to railroad rates, a limitation that finds no support in the plain language or legislative history of the provision.³

Even apart from the Board's authority under Section 721(b)(4), the manner in which the Board adopted its suspension order is independently authorized under the Administrative Procedures Act, which expressly exempts from notice-and-comment procedures "rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). A "rule of agency organization, procedure, or practice" is one that "does not itself 'alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.'" *Chamber of Commerce v. Department of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999) (quoting *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)). Here, the Board made clear that it was not prejudging the ultimate outcome of a possible BNSF/CN control application under the anticipated new merger rules, but instead was only temporarily suspending consideration of all major rail consolidation transactions (including the BNSF/CN proposal) until appropriate revisions to the Board's rail consolidation rules were adopted. The suspension order simply "maintain[s] the status quo." Decision at 3. Courts have sustained, as a proper agency "procedural" rule exempt from notice-and-comment requirements, similar agency orders suspending consideration of individual applications pending development of appropriate standards or procedures. *See, e.g., Neighborhood TV Co. v. FCC*, 742 F.2d 629 (D.C. Cir. 1984);

³ The legislative history cited by BNSF (Pet. at 4) and by the Board (Decision at 10 n.15) merely confirms that the injunctive rate-suspension authority previously exercised by the ICC was intended to be embraced by the new Section 721(b)(4), not that the new provision is *limited* in its application to rate issues. *DeBruce Grain* was not a rate-suspension case at all, of course, and the Board denied relief on the ground that no irreparable harm flowing from a statutory violation had been proven, not that Section 721(b)(4) is confined to rate-suspension orders.

Westinghouse Electric Corp. v. NRC, 598 F.2d 759 (3d Cir. 1979) (and cases cited therein); *Kessler v. FCC*, 326 F.2d 67 (D.C. Cir. 1963); *Krueger v. Morton*, 539 F.2d 235 (D.C. Cir. 1976).

BNSF's challenge to the validity of the Board's suspension order thus rests on the unlikely proposition that the procedural timetable set forth in 49 U.S.C. § 11325 somehow divests the Board of its express authority to adopt rules and procedures implementing its public-interest mandate, and effectively compels the Board to engage in a year-long adjudicatory proceeding to consider a proposed transaction that, it has already determined, cannot be properly considered until the Board has adopted new merger standards that make sense in light of current conditions. Section 11325 does not support such an absurd result. On its face, the provision does not require the Board to process and decide rail consolidation applications when (as the Board has found here) doing so would be contrary to the public interest. Instead, the provision simply establishes time deadlines for processing and decision of applications that the Board has found to be complete and to state a *prima facie* case for approval under the statutory public-interest standard.

Contrary to BNSF's argument, the Board is not required to initiate a proceeding upon the filing of a rail consolidation application. *See* 49 U.S.C. § 11324(a) (Board "may" initiate a proceeding in response to the filing of a rail consolidation application). As BNSF admits (Pet. at 5), both the statute and the Board's regulations provide that the statutory timetable and decision deadline apply only to individual rail consolidation applications that the Board has accepted as complete. 49 U.S.C. §§ 11325(a); 49 C.F.R. § 1180.4(c)(7). Thus, the procedural provisions relied on by BNSF would clearly permit the Board to reject a BNSF/CN application on the ground that it failed to state a *prima facie* case or was incomplete in light of the Board's announced intention to adopt new merger rules. Wisely, the Board has made its policy judgment clear, and has precluded such unnecessary, costly and, to the industry, potentially damaging consideration of major rail consolidation applications that cannot properly be evaluated or

approved on the merits at this time and that, at best, would have to be adjudicated anew after the Board adopts its planned new rail merger rules. Decision at 7.

Far from flouting statutory requirements and acting in derogation of its statutory authority, the Board has acted responsibly and lawfully in response to what is perhaps the most significant challenge the railroad industry has faced in two decades. Accordingly, BNSF is unlikely to prevail on the merits of its challenge to the validity of the Board's Decision.

II. BNSF HAS FAILED TO DEMONSTRATE THAT IT WILL SUFFER IRREPARABLE INJURY IF A STAY IS NOT GRANTED.

Under established law, BNSF must demonstrate that, absent issuance of a stay, it will suffer irreparable injury that is "both certain and great" and "actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam); ICC Finance Docket No. 28905 (Sub-No. 22), *CSX Corp. -- Control -- Chessie System, Inc.* (decided July 19, 1990). BNSF has not, and cannot, meet this standard.

BNSF's claim of irreparable injury rests solely on the assertion that the Board's Decision will delay consummation of the proposed BNSF/CN consolidation by a period of up to (but possibly less than) 15 months, and that this delay may result in the deferral or loss of the anticipated economic benefits of the proposed transaction. Pet. at 7-9. Far from being actual, certain and great, these claimed merger benefit losses are at best speculative and tenuous both in fact and in amount.⁴ At this point in time, the claimed benefits are completely unproven by any evidentiary showing.⁵ Even so, BNSF and CN could suffer these claimed economic losses *only* on the

⁴ BNSF's claimed loss of merger benefits would actually be relatively modest if the pending judicial review proceedings were expedited, as BNSF presumes. Pet. at 1. *Cf.*, *Water Transport Ass'n v. ICC*, 715 F.2d 581, 586 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984) (granting expedited review). Indeed, it is not inconceivable that BNSF's petition for judicial review could be heard and decided within a few months and, if decided in BNSF's favor, could permit full disposition of a BNSF/CN application within the 16-month statutory decision deadline even in the absence of a stay.

⁵ Moreover, as the Board noted, it is possible that some significant portion of the claimed merger benefits could be achieved by means short of formal consolidation and, therefore, would be available to BNSF and CN even if the requested stay were denied. Decision at 9.

assumptions that the Board would approve the proposed BNSF/CN consolidation, and do so without imposition of offsetting conditions that would reduce the anticipated merger benefits, and that BNSF/CN could actually achieve the claimed benefits by successfully implementing an approved transaction without the disabling and costly service problems that recent major rail consolidations have experienced, and without subjecting other carriers and parties to offsetting losses. In light of the Board's findings and the recent industry experience, these contingencies are simply too speculative to support a finding of clear, definite and substantial irreparable harm. *See Wisconsin Gas*, 758 F.2d at 674 (claimed harm must be "certain to occur in the near future").⁶

III. OTHER PARTIES AND THE PUBLIC INTEREST WOULD BE SUBSTANTIALLY HARMED IF A STAY WERE ISSUED.

BNSF has also failed to demonstrate, as it must, that granting the requested stay would not substantially harm other parties and that it is otherwise consistent with the public interest. In this case, the entire thrust of the Board's Decision is to preserve the status quo, prevent serious and irreparable harm to a broad spectrum of interests (including the railroads and shippers), and thus to protect the fundamental integrity of the entire national rail system. The Decision is replete with findings, based on substantial evidence, that permitting any major rail consolidation transaction to go forward at this time would pose grave risks for the rail industry and the public interest. Decision at 7-10 (discussing "serious potential public harms that could result from going

⁶ In addition, BNSF's claimed loss of merger benefits, even if otherwise proven, would not be directly traceable to the Board's Decision. BNSF's claimed irreparable harm would result, if at all, only from the Board's 15-month suspension of rail consolidation activity and commensurate delay in the final consummation of the BNSF/CN transaction. But even if the Board's suspension order were stayed, as BNSF requests, BNSF and CN in all likelihood would be subjected to the very same delay. The Board made clear that, if it is forced to process a BNSF/CN control application before it has had a chance to develop new merger rules, it would likely require the BNSF/CN application proceeding to "start all over again" after the Board's adoption of new rail merger rules (Decision at 7), because any BNSF/CN consolidation application filed before the planned adoption of new merger rules would either be deemed incomplete or would be rejected on the merits as not consistent with the public interest. Thus, even if the Board were to give credence to BNSF's claim of economic loss, granting the stay would not redress that claimed harm.

forward" now). Granting the requested stay would negate the remedial purposes of the Board's suspension order, and open the way for the very public harms the Board sought to avert.⁷

These dangers far outweigh any possible economic losses that BNSF and CN might incur if they are forced to delay their proposed combination for the relatively modest period necessary for the court to complete judicial review of the Board's Decision or, if sooner, for the Board to complete its planned rulemaking proceeding. Indeed, the balance of hardships is not even a close call, particularly given the Board's statement that the BNSF/CN application, even if allowed to go forward now, would likely have to be started over after the Board's adoption of new merger rules. Decision at 7. The Board has exercised its responsibility by determining that suspension of major rail consolidation activity is necessary to vindicate the public interest. Staying the Decision would, by definition, strongly disserve the public interest.

CONCLUSION

For all of the foregoing reasons, the Board should deny BNSF's petition for a stay.

Respectfully submitted,



J. Gary Lane
George A. Aspatore
John V. Edwards
Maquiling B. Parkerson
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2600

G. Paul Moates
Vincent F. Prada
Paul A. Hemmersbaugh
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
(202) 736-8711 (fax)

Counsel for Norfolk Southern Corporation and Norfolk Southern Railway Company

DATED: March 27, 2000

⁷ Even worse, granting the stay could have the perverse effect of enabling BNSF and CN to evade the effects of the Board's suspension order, *even if* their legal challenge fails and the order is upheld by the reviewing court. If a stay is entered and the appellate court declines to expedite its consideration of the petitions for judicial review, the Board might be required to process, complete and decide the BNSF/CN consolidation application, and BNSF and CN might be able to consummate the transaction, before the court has acted. Far from preserving the status quo, a stay could effectively give BNSF the relief it seeks from the court.

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of March, 2000, I served the foregoing "Reply of Norfolk Southern to BNSF's Petition for Stay Pending Judicial Review" by causing a copy thereof to be sent in the manner indicated below to each of the following:

Erika Z. Jones
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006-1101
(By Messenger)

Jeffrey R. Moreland
Richard E. Weicher
The Burlington Northern and
Santa Fe Railway Company
2500 Lou Menk Drive
P.O. Box 961039
Fort Worth, Texas 76161-0039
(By FedEx)

Paul A. Cunningham
Harkins Cunningham
801 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20004-2664
(By Messenger)

Jean Pierre Ouellet
Canadian National Railway Company
P.O. Box 8100
Montreal, PQ H3B 2M9
Canada
(By FedEx)

William L. Slover
C. Michael Loftus
Robert D. Rosenberg
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(By Messenger)

Dennis G. Lyons
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(By Messenger)

Louis E. Gitomer
Ball Janik, LLP
1445 F Street, N.W.
Washington, D.C. 20005
(By Messenger)

Mark G. Aron
Peter J. Shudtz
CSX Corporation
One James Center
Richmond, Virginia 23219
(By FedEx)

P. Michael Giftos
CSX Transportation, Inc.
Speed Code J-120
500 Water Street
Jacksonville, Florida 32202
(By FedEx)

Terence M. Hynes
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(By Messenger)

J. Michael Hemmer
David L. Meyer
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566
(By Messenger)

James V. Dolan
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(By FedEx)